Goh Paik Swan v Ng Choo Lum

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO P–02–681–1995
GOPAL SRI RAM, NH CHAN AND MOKHTAR SIDIN JJCA
9 OCTOBER 1996

Land Law *— Sale of land — Caveat — Application for removal of caveat — Registered proprietor of land executed document stating he agreed to sell land to purchaser — Deposit sum would be forfeited if sale and purchase not signed within two weeks — Purchaser entered caveat — From 19B described document as option — No evidence that registered proprietor prevented purchaser from exercising option — Whether caveat should be allowed to remain — National Land Code 1965 s 327*

Land Law *— Sale of land — Caveat — Application for removal of caveat — Principles to be applied — National Land Code 1965 s 327*

The appellant was the registered proprietor of two pieces of land in Seberang Perai ('the lands'). Pursuant to a document which was executed by the appellant on 4 May 1995 ('the document'), the appellant agreed to sell the lands to the respondent at the price of RM45,000 per acre. It was also indicated in the document that the appellant had received a deposit sum of RM8,000 which would be forfeited if sale and purchase agreement was not made within two weeks from the date of the document. On 17 May 1995, the respondent's solicitors wrote to the appellant informing her that pursuant to the document, the respondent had deposited a sum of RM35,611.30 being the balance of the deposit sum with them, with the purpose of proceeding with the purchase of the lands. The appellant was also asked to attend to the solicitors' office to settle the terms and conditions for the sale and purchase agreement.The appellant did not respond to this letter. On 19 May 1995, the respondent entered a caveat against the titles to the lands. The application for the caveat was supported by a statutory declaration by the respondent's solicitor. In his application for the entry of a caveat in Form 19B, the respondent stated, inter alia, that he had paid a sum of RM35,611.30 to his solicitors in accordance with the document, which he described as an 'option'. There was, however, no sale and purchase agreement either negotiated or executed by the parties. On 11 July 1995, the appellant moved the High Court under s 327 of the National Land Code 1965 ('the Code') for the removal of the respondent's caveat. That application was refused by the judge upon the sole ground that the respondent had a caveatable interest because the document was an enforceable agreement by which the parties had bound themselves on the subject of the sale. It appeared that the trial judge judge sustained the caveat not upon the grounds relied on by the respondent in his Form 19B, but upon a wholly different basis advanced in the respondent's affidavit filed in opposition to the appellant's motion — namely, that the document was good as a contract. The appellant appealed.

Held, allowing the appeal:

(1) The trial judge did not sufficiently appreciate the propositions established by decisions of the Court of Appeal in *Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor* [1995] 1 MLJ 719 and *Murugappa Chettiar Lakshmanan v Lee Teck Mook* [1995] 1 MLJ 782, nor did he properly apply them to the facts of this case. All that he did was to find that the respondent had a caveatable interest, and on that basis, he held that the caveat ought to remain. Accordingly, there was no proper exercise of discretion by the judge in relation to the appellant's application. In these circumstances, it was open to this court — indeed, this court was duty bound — to examine the matter afresh (see pp 443I and 444A–B).

(2) There are three hurdles which a caveat must surmount before it may be permitted to remain upon the register. An investigation into the following matters are required: (i) whether the respondent, on the material set out by him in his application under s 323(1) of the Code, has disclosed a caveatable interest; (ii) if he has established a caveatable interest, then, whether the evidence he produced in support of his claim to that caveatable interest discloses a serious question to be tried; and (iii) if the first two questions are resolved in the respondent's favour, then, whether the balance of convenience, or more appropriately, the balance of justice, lies in favour of the caveat remaining on the register pending the disposal of his suit (see p 444C–E); *Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor* [1995] 1 MLJ 719 and *Murugappa Chettiar Lakshmanan v Lee Teck Mook* [1995] 1 MLJ 782 followed.

(3) This court was unable to agree with the trial judge's interpretation upon the document. The document did not amount to a contract, but was merely an option granted by the appellant to the respondent to sell the lands to the respondent. That option was to be exercised by the execution of an agreement between the parties within the time frame therein stipulated. In the event, no agreement was made and the option lapsed at the end of the two-week period (see p 445B–C).

(4) The judge had also overlooked the inconsistent stand taken by the respondent when he came to resist the application to remove the caveat. In his affidavit, the respondent said that the document was an agreement made between himself and the appellant. However, he went on to say that if the document was to be construed as an option, then, he had duly exercised it (see p 445H).

(5) The respondent had, in his application in Form 19B for the entry of the caveat, described the document as an option and not as an agreement. The judge was wholly wrong to ignore a solemn claim made in a form prescribed by Parliament for purposes of

imposing a serious restraint upon the exercise by a registered proprietor of his rights over his immovable property (see p 445E–F).

(6) The judge misdirected himself by failing to subject the affidavit evidence in the case to the meticulous scrutiny called for by Jemuri Serjan CJ (Borneo) in *Kumpulan Sua Betong Sdn Bhd v Dataran Segar Sdn Bhd* [1992] 1 MLJ 263(see p 446C).

(7) As the basis of the respondent's claim to the titles to the lands rested on an option, it was for him to satisfy the court that he had exercised the option in the manner prescribed therein, or that he had been prevented by the appellant from doing so. And in this, he plainly failed (see p 445F–G).

(8) Not only was there no exercise of the option, but the way in which the respondent purported to sustain the caveat at the hearing of the motion demonstrated sufficiently that his claim to the lands failed to disclose a serious question to be tried (see p 446D).

[Bahasa Malaysia summary

Perayu adalah pemunya berdaftar kepada dua bidang tanah di Seberang Perai ('tanah tersebut'). Mengikut suatu dokumen yang disempurnakan oleh perayu pada 4 Mei 1995 ('dokumen tersebut'), perayu bersetuju untuk menjual tanah tersebut kepada penentang pada harga RM45,000 seekar. Adalah juga ditunjukkan di dalam dokumen tersebut bahawa perayu telah menerima deposit sebanyak RM8,000 yang akan dilucut hak sekiranya perjanjian jual beli tidak dibuat dalam masa dua minggu dari tarikh dokumen tersebut. Pada 17 Mei 1995, peguamcara penentang menulis kepada perayu memberitahunya bahawa mengikut dokumen tersebut, penentang telah mendeposit dengan mereka sebanyak RM35,611.30 yang merupakan baki jumlah deposit, dengan tujuan untuk meneruskan pembelian tanah tersebut. Perayu juga diminta untuk hadir ke pejabat peguamcara itu untuk menyelesaikan terma-terma dan syarat-syarat perjanjian jual beli itu. Perayu tidak membalas surat ini. Pada 19 Mei 1995, penentang memasukkan kaveat terhadap hakmilik kepada tanah tersebut. Permohonan untuk kaveat itu disokong oleh deklarasi statutori oleh peguamcara penentang. Dalam permohonannya untuk memasukkan kaveat dalam Borang 19B, penentang menyatakan, antara lain, bahawa dia telah membayar sebanyak RM35,611.30 kepada peguamcaranya menurut dokumen tersebut, yang dia menyifatkan sebagai suatu 'opsyen'. Walau bagaimanapun, tidak ada perjanjian jual beli yang dirundingkan atau disempurnakan oleh pihak-pihak itu. Pada 11 Julai 1995, perayu memohon kepada Mahkamah Tinggi di bawah s 327 Kanun Tanah Negara 1965 ('Kanun tersebut') untuk membatalkan kaveat penentang. Permohonan itu ditolak oleh hakim atas sebab tunggal bahawa penentang mempunyai kepentingan boleh kaveat kerana dokumen tersebut adalah perjanjian yang boleh

dikuatkuasakan, yang mana pihak-pihak adalah terikat dengan subjek jualan itu. Jelaslah bahawa hakim perbicaraan mengekalkan kaveat itu bukan atas alasan yang digunakan oleh penentang dalam Borang 19B, tetapi atas asas yang sama sekali berbeza dengan yang dikemukakan dalam afidavit penentang yang difailkan untuk membantah usul perayu — iaitu, bahawa dokumen itu adalah suatu kontrak. Perayu merayu.

Diputuskan, membenarkan rayuan:

(1) Hakim perbicaraan tidak memberikan perhatian yang secukupnya kepada usul yang diwujudkan oleh keputusan Mahkamah Rayuan dalam *Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor* [1995] 1 MLJ 719 dan *Murugappa Chettiar Lakshmanan v Lee Teck Mook* [1995] 1 MLJ 782. Beliau juga tidak memakainya dengan wajar ke atas fakta-fakta kes ini. Apa yang beliau lakukan hanyalah membuat keputusan bahawa penentang mempunyai kepentingan boleh kaveat, dan atas asas itu, beliau memutuskan bahawa kaveat itu perlu dikekalkan. Oleh itu, tidak ada pelaksanaan budi bicara yang wajar oleh hakim itu berkenaan dengan permohonan perayu. Dalam keadaan-keadaan ini, adalah terbuka kepada mahkamah ini — malahan, mahkamah ini adalah terikat dengan kewajipan — untuk memeriksa perkara itu sekali lagi (lihat ms 443I dan 444A–B).

(2) Terdapat tiga halangan yang suatu kaveat mesti mengatasi sebelum ia dibenarkan untuk kekal dalam daftar. Satu penyiasatan ke atas perkara-perkara berikut adalah dikehendaki: (i) sama ada penentang, atas material yang dinyatakan olehnya dalam permohonannya di bawah s 323(1) Kanun tersebut, telah mendedahkan suatu kepentingan boleh kaveat; (ii) sekiranya beliau telah membuktikan kepentingan boleh kaveat, sama ada bukti yang dikemukakan untuk menyokong tuntutannya terhadap kepentingan boleh kaveat itu mendedahkan satu persoalan yang serius untuk dibicarakan; dan (iii) sekiranya dua persoalan di atas diselesaikan berpihak kepada penentang, sama ada imbangan kemudahan, atau lebih tepat, imbangan keadilan, berpihak kepada kaveat itu dikekalkan dalam daftar sementara menunggu penyelesaian guamannya (lihat ms 444C–E); *Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor* [1995] 1 MLJ 719 dan *Murugappa Chettiar Lakshmanan v Lee Teck Mook* [1995] 1 MLJ 782 diikut.

(3) Mahkamah ini tidak bersetuju dengan pentafsiran yang diberikan oleh hakim perbicaraan terhadap dokumen tersebut. Dokumen itu tidak membentuk suatu kontrak, tetapi hanya satu opsyen yang diberikan oleh perayu kepada penentang untuk menjual tanah tersebut kepada penentang. Opsyen itu hendaklah

dilaksanakan dengan penyempurnaan perjanjian di antara pihak-pihak itu dalam masa yang telah ditetapkan dalam perjanjian itu. Tidak ada perjanjian dibuat dan opsyen itu luput pada akhir tempoh masa dua minggu itu (lihat ms 445B–C).

(4) Hakim juga telah terlepas perhatian terhadap pendirian penentang yang tidak konsisten apabila dia menentang permohonan untuk menyingkirkan caveat. Di dalam affidavitnya, penentang mengatakan bahawa dokumen tersebut merupakan suatu perjanjian yang dibuat antara dirinya sendiri dan perayu. Walau bagaimanapun, dia kemudiannya mengatakan bahawa jika dokumen tersebut ditafsirkan sebagai suatu opsyen, dia telah melaksanakannya seperti yang sepatutnya (lihat ms 445H).

(5) Penentang telah, dalam permohonannya dalam Borang 19B untuk memasukkan kaveat itu, menyifatkan dokumen tersebut sebagai suatu opsyen dan bukan suatu perjanjian. Hakim adalah salah sama sekali kerana tidak mengendahkan tuntutan yang dibuat dengan takzim dalam borang yang dikeluarkan oleh Parlimen untuk tujuan mengenakan halangan yang serius ke atas pemunya berdaftar terhadap pelaksanaan hak-hak harta tak alihnya (lihat ms 445E–F).

(6) Hakim telah salah arah dirinya sendiri kerana gagal untuk menaklukkan keterangan afidavit dalam kes ini kepada penelitian yang cermat seperti yang dikehendaki oleh Jemuri Serjan CJ (Borneo) dalam *Kumpulan Sua Betong Sdn Bhd v Dataran Segar Sdn Bhd* [1992] 1 MLJ 263 (lihat ms 446C).

(7) Oleh kerana asas kepada tuntutan penentang terhadap hakmilik kepada tanah tersebut berdasarkan opsyen, dia hendaklah meyakinkan mahkamah bahawa dia telah melaksanakan opsyen itu dengan cara seperti yang dinyatakan di dalamnya, atau bahawa dia telah dihalang oleh perayu daripada berbuat demikian. Tetapi, dia telah gagal berbuat demikian (lihat ms 445F–G).

(8) Bukan sahaja tidak terdapat pelaksanaan opsyen itu, tetapi cara bagaimana penentang cuba untuk mengekalkan kaveat itu pada perbicaraan usul menunjukkan dengan mencukupi bahawa tuntutannya terhadap tanah tersebut gagal mendedahkan persoalan yang serius untuk dibicarakan (lihat ms 446D).]

[*Editorial Note*: The respondent has applied for leave to appeal to the Federal Court vide Civil Application No 08–52–96.]

Notes

For cases on caveats, see 8 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 2241–2419, 2498–2507.

Cases referred to

Ayer Hitam Tin Dredging Malaysia Bhd v YC Chin Enterprises Sdn Bhd [1994] 2 MLJ 754
Charles Grenier Sdn Bhd v Lau Wing Hong [1996] 3 MLJ 327
Godecke & Anor v Kirwan (1973) 1 ALR 457
Kho Ah Soon v Duniaga Sdn Bhd [1996] 2 MLJ 181
Kumpulan Sua Betong Sdn Bhd v Dataran Segar Sdn Bhd [1992] 1 MLJ 263
Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor [1995] 1 MLJ 719
Murugappa Chettiar Lakshmanan v Lee Teck Mook [1995] 1 MLJ 782
Voo Syun Mui v Yap Mooi Mooi [1984] 2 MLJ 48

Legislation referred to

National Land Code 1965 s 327

Appeal from: Originating Motion No 25–44–1995 (High Court, Pulau Pinang)

V Muthusamy (*Santhi Muthusamy* with him) (*V Muthusamy & Tan*) for the appellant.
Saw Lip Khai (*Ooi Teik Hoe* with him) (*Ooi Lee & Co*) for the respondent.

Cur Adv Vult

Gopal Sri Ram JCA (delivering the judgment of the court): The only issue in this appeal is whether the respondent had a caveatable interest in the appellant's lands. The learned judge resolved that issue in the respondent's favour. We disagreed with the learned judge, and held that there was no caveatable interest.

Indeed, having read the record provided with great care, we formed the view that the judge was clearly wrong and, for that reason, called upon counsel for the respondent to support the judgment appealed from without requiring counsel for the appellant to argue the appeal. Having heard arguments from counsel for the respondent, we were satisfied that the preliminary view which we had formed of the matter was entirely correct. We therefore reversed the learned judge. The reasons for our decision now follow.

The brief facts of this case are as follows.

The appellant is the registered proprietor of two pieces of land held under Geran Mukim No GM 169 for Lot No 578 and Geran Mukim No GM 170 for Lot No 579 in Daerah Seberang Perai Selatan ('the said lands'). On 4 May 1995, the appellant executed a document which reads as follows:

I, Goh Phaik Swan I/C No 8383203 of 12, Bunga Raya Satu, off Jalan Raja Uda, 13000 Butterworth, PW hereby agree to sell two pieces of land, Lots 578 and 579 Mk 9 Transkrian Sek Perai, to Mr Ng Choo Lum @ Ng Poon Lum at the price of RM45,000 per acre.

Hereby I received RM8,000 as deposit. Deposit for RM8,000 will be forfeited if agreement is not made within two weeks' date hereof.

Thank you.

Yours faithfully,

—Sgd—

On 17 May 1995, Messrs JB Lim & Associates, a firm of advocates and solicitors, wrote to the appellant a letter which reads as follows:

Dear Sir/Madam,

Re: Lot Nos 578 and 579 Mukim 9, Transkrian, Daerah Seberang Perai Selatan

We refer to the above and inform you that pursuant to your letter dated 4 May 1995 the intending purchaser Ng Chu Lum @ Ng Poon Lum has deposited a sum of RM35,611.30 being the balance of the deposit sum with us with the purpose of proceeding with the purchase of the subject properties.

We are in the process of preparing the sale and purchase agreement for your execution and shall be pleased if you could attend at our office for us to settle the terms and conditions for the sale and purchase agreement.

The appellant did not respond to this letter.

On 19 May 1995, the respondent entered a caveat against the titles to the said lands. The application for the caveat was supported by a statutory declaration by the respondent's solicitor, Mr Lim Jit Boo. In his application for the entry of a caveat in Form 19B, the respondent stated, among other things, that he had paid a sum of RM35,611.30 to Messrs JB Lim & Associates in accordance with the document dated 4 May 1995, which he described as an 'option'. There was, however, no sale and purchase agreement either negotiated or executed by the parties.

On 11 July 1995, the appellant moved the High Court under s 327 of the National Land Code 1965 ('the Code') for the removal of the respondent's caveat. That application was refused by the learned judge upon the sole ground that the respondent had a caveatable interest because the document of 4 May 1995 was an enforceable agreement by which the parties had bound themselves on the subject of the sale.

Although the learned judge referred to the decisions of this court in *Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor* [1995] 1 MLJ 719 and *Murugappa Chettiar Lakshmanan v Lee Teck Mook* [1995] 1 MLJ 782, it would appear that he did not sufficiently appreciate the propositions established by these cases. Nor did he properly apply them to the facts of

the case before him. All that the learned judge did was to find that the respondent had a caveatable interest. And on that basis, he held that the caveat ought to remain. He went no further. Accordingly, there was no proper exercise of discretion by the learned judge in relation to the appellant's application. In these circumstances, it is open to this court — indeed, we are duty bound — to examine the matter afresh.

We find it unnecessary to undertake a detailed examination of the principles applicable to the present case. Suffice that we remind ourselves of what was said by this court in *Murugappa Chettiar Lakshmanan* (at p 788) in relation to the three hurdles which a caveat must surmount before it may be permitted to remain upon the register:

> The principles formulated in *Luggage Distributors* as applied to the present appeal require an investigation into the following matters. First, whether the respondent, on the material set out by him in his application under s 323(1) of the Code, has disclosed a caveatable interest. Secondly, if he has established a caveatable interest, then, whether the evidence he produced before the learned judicial commissioner in support of his claim to that caveatable interest discloses a serious question to be tried. Lastly, if the first two questions are resolved in the respondent's favour, then, whether the balance of convenience, or more appropriately, the balance of justice, lies in favour of the caveat remaining on the register pending the disposal of his suit.

The peculiar facts of the instant case render it convenient to deal with the first and second questions together. These are: (1) whether the respondent had shown that he had a caveatable interest; and (2) whether the respondent had demonstrated that his claim disclosed a serious question requiring or calling for a trial.

The judge, as earlier observed, resolved the first question in the appellant's favour, but did not enter upon the second. He did so on the footing that the document of 4 May 1995 was a concluded contract for the sale and purchase of the said lands. And he drew support for his view from the decision of the (then) Supreme Court in *Ayer Hitam Tin Dredging Malaysia Bhd v YC Chin Enterprises Sdn Bhd* [1994] 2 MLJ 754 and of the Federal Court in *Voo Syun Mui v Yap Mooi Mooi* [1984] 2 MLJ 48. Indeed, the learned judge quoted the following passage (at p 52 of the report) from the judgment of Syed Agil Barakbah FJ in the latter case:

> In our view the evidence and exhibits in this case and also the conduct of the appellant clearly show that it was the intention of the parties to come to a definite and complete agreement on the subject of the sale. What remained to be done was for the respondent to exercise the option in accordance with the terms stated in the option. The mere fact that it was subject to an agreement to be signed did not necessarily mean there was no legal binding and enforceable agreement.

We would, for completeness, quote the following passage from the very recent decision of the Federal Court in *Charles Grenier Sdn Bhd v Lau Wing Hong* [1996] 3 MLJ 327:

A An agreement to make an agreement does not result in a contract. It is for the court in each case to construe the correspondence exchanged between the parties and to say whether that is the result intended by the parties. If the court reaches an opposite conclusion, then there is an enforceable contract.

B Reverting to the judgment of the learned judge, we are, with respect, unable to agree with the interpretation that he placed upon the document in question. In our judgment, the document of 4 May 1995 does not amount to a contract. It was merely an option granted by the appellant to the respondent to sell the said lands to the respondent. That option was to be exercised by the execution of an agreement between the parties C within the time frame therein stipulated. In the event, no agreement was made and the option lapsed at the end of the two-week period. We also note that there was never any suggestion — either in the correspondence or in the respondent's affidavit — that the appellant, by his words or conduct, prevented the execution of the agreement contemplated by the D terms of the document of 4 May 1995.

Meaning no disrespect to the learned judge, it would appear that he did not sufficiently address his mind to the facts that were presented to him. The respondent had, in his application in Form 19B for the entry of the caveat, described the document of 4 May 1995 as an option and not as an agreement. Having entered the caveat on that footing he was, if he E desired this restraint to remain upon the register, obliged to sustain its existence upon the grounds stated by him in his aforesaid application. It would be wholly wrong to ignore, as the learned judge did, a solemn claim made in a form prescribed by Parliament for purposes of imposing a serious restraint upon the exercise by a registered proprietor of his rights F over his immovable property.

Because the basis of the respondent's claim to the titles to the said lands rested on an option, it was for him to satisfy the court that he had exercised the option in the manner prescribed therein, or that he had been prevented by the appellant from doing so. And in this, he plainly failed. Since the agreement was never executed within the time limited by the G option, no contract came into existence.

The learned judge also overlooked the inconsistent stand taken by the respondent when he came to resist the application to remove the caveat. In his affidavit filed in opposition to the appellant's motion, the respondent said that the document of 4 May 1995 was an agreement made H between himself and the appellant. He then went on to say that if the document of 4 May 1995 was to be construed as an option, then, he had duly exercised it. There is no necessity for us to deal with the second contention. We have earlier expressed our satisfaction that the option was never exercised.

I Taking the former contention — the stance that the document in question was an agreement — was clearly not the basis upon which he had entered the caveat. Here is a case of a caveator entering his caveat upon

one ground and later, on finding that that ground was unsustainable, seeking to sustain the caveat on some other alternative ground not stated in Form 19B. This, quite apart from being impermissible, also demonstrates the hopelessness of the caveator's claim to the titles.

Unfortunately, the learned judge sustained the caveat — not upon the grounds relied on by the respondent in his Form 19B, but upon a wholly different basis advanced in the affidavit — namely, that the document of 4 May 1995 was good as a contract. In our judgment, the learned judge misdirected himself by failing to subject the affidavit evidence in the case to the meticulous scrutiny called for by Jemuri Serjan CJ (Borneo) in *Kumpulan Sua Betong Sdn Bhd v Dataran Segar Sdn Bhd* [1992] 1 MLJ 263. Had he done so, he would not have directed the caveat to remain on the register.

In our judgment, not only was there no exercise of the option, but the way in which the respondent purported to sustain the caveat at the hearing of the motion demonstrated sufficiently that his claim to the said lands failed to disclose a serious question to be tried.

Mr Saw Lip Khai, of counsel for the respondent, submitted that it would be quite wrong for us to hold that his client's claim did not raise a serious question to be tried. Whether the option dated 4 May 1995 had been properly exercised by the respondent, he argued, was a serious question to be tried. He said that the matter had been concluded in his client's favour by high authority. In support of these arguments, counsel referred to the decision of the Federal Court in *Kho Ah Soon v Duniaga Sdn Bhd* [1996] 2 MLJ 181, where Peh Swee Chin FCJ, speaking of the option granted by the unsuccessful appellant in that case, said (at pp 186–187):

> First the court below said that the caveator had no cause of action as between the caveator and the caveatee because there was no privity of contract. *We are unable to agree; since the option was an offer, such cause of action would be dependent on the highly controversial issue as to whether the offer was validly accepted. This would be a serious question for trial dependent on evidence and cross-examination.*
>
> The court below said that the letter of acceptance, allegedly posted by the caveator to the caveatee, was never received. Further on the issue of the sub-option, the notice of exercising the said sub-option on a woman who claimed to be the wife of the said Tan was not effective. These disputed issues, with what has been stated in the preceding paragraph, should not and could not be used by the lower court to decide the fate of the motion: see *Tay Bok Choon v Tahansan Sdn Bhd* [1987] 1 MLJ 433, (PC), ie a court should decide only on consideration of undisputed facts in affidavits and not on credibly-denied allegations, in the absence of oral evidence and cross-examination, per Lord Templeman at p 436. (Emphasis added.)

Counsel relied upon that part of the above-quoted passage, to which we have lent emphasis, as concluding the issue against the appellant. With respect, we do not agree.

In our judgment, the passage following that relied on by counsel amply demonstrates the context in which the Federal Court found the question whether the particular option in that case had been validly exercised to be one requiring *viva voce* investigation. Accordingly, it is clear that *Kho Ah Soon* is not authority for the proposition advanced by counsel — namely, that whenever the question arises as to whether an option has been properly exercised, it is to be regarded, without more, as a serious question calling for a trial. Since each case depends for its result on its own facts, it is extremely unsafe to place reliance upon words spoken in the context of a particular case. We therefore entertain no difficulty whatsoever in dissenting from the submission made by counsel for the respondent.

Mr Saw also urged upon us the decision of the Australian High Court in *Godecke & Anor v Kirwan* (1973) 1 ALR 457, which he said was authority for the proposition that where parties who employ a common solicitor enter into a transaction without reaching agreement upon important terms, the common solicitor may fix those terms as between them. The following passage in the judgment of Walsh J (at p 466) was read to us:

> It is clearly established that a binding agreement may be made which leaves some important matter, eg the price, to be settled by the decision of a third party. I agree with respect with the view of Bray CJ that, subject to the qualifications to which he refers ([1968] SASR at p 398), there is no reason in principle for holding that there cannot be any binding contract if some matter is left to be determined by one of the contracting parties.
>
> In the present case the parties set out all the principal terms which were to govern the sale and purchase of the land and these included provisions which imposed by implication an obligation to execute a formal contract. There was also a promise by the purchaser to execute, if required to do so, a further agreement in accordance with cl 6. In my opinion, that clause should be construed as limited to permitting the insertion of covenants and conditions not inconsistent with those contained in the offer. It was limited also by the reference to the reasonableness of requiring the inclusion of the covenants and conditions. In my opinion, this does not mean that anything may be required which, in the opinion of the solicitors, is reasonable. It means that what is required must be reasonable in an objective sense, and in case of dispute this is a matter which the court can decide. Clause 6 does not mean that the purchaser is making an agreement to agree later upon additional provisions to govern the bargain. It means that he is agreeing presently to accept as part of the bargain such additional provisions, if any, as are required, provided that they satisfy the requirements of consistency with the other terms and of reasonableness to which I have referred. If, contrary to my view, cl 6 authorizes the vendor to require the execution of a further agreement after the contract contemplated by cl 3 and special condition 1 has been executed, then cl 6 would still operate subject to the limitations already discussed and, in my opinion, the vendor, if he wished to take advantage of it, would have to invoke it within a reasonable time, this again being a matter for decision if necessary by a court. The fact that more than one view may be open as to the time at which and the manner in which

cl 6 was intended to operate does not itself require a conclusion that the agreement is void for uncertainty: see *Upper Hunter County District Council v Australian Chilling & Freezing Co Ltd* (1968) 118 CLR 429 at pp 436–437.

With respect to counsel, we are unable to see the relevance of his arguments to the case at hand. As earlier observed, this case concerns an option by the terms of which an agreement had to be made within two weeks of its date, failing which the consideration paid for the option was forfeitable by the appellant. This is a common feature of options which leave an offer open for a fixed period of time for consideration. In the circumstances, we would respectfully decline the invitation of counsel to embark upon a discussion of the principles discussed in *Godecke*.

Having come to the conclusion that the learned judge was wrong in the decision he had arrived at, we allowed the appeal with costs in this court and of the proceedings in the court below. The deposit paid into court was ordered to be paid out to the appellant to account of his taxed costs. The caveat was also ordered to be removed forthwith.

Order accordingly.

Reported by Isabel Liong